Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GAME SHOW NETWORK, LLC,	)	
Complainant,	)	MB Docket No. 12-122
	)	File No. CSR-8529-P
v.	)	
	)	
CABLEVISION SYSTEMS CORP.,	)	
Defendant.	)	
	)	
Program Carriage Discrimination	)	

TO: The Commission

OPPOSITION OF GAME SHOW NETWORK, LLC TO CABLEVISION'S PETITION TO STAY THE INITIAL DECISION

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Summary

In his Initial Decision the Commission's Chief Administrative Law Judge held unequivocally that Cablevision violated Section 616 when in February 2011 it moved GSN from a broadly-penetrated expanded basic tier to a pay-extra sports tier, without reasonable business justification and after having given no consideration to retiering its similarly-situated affiliate program services. He directed, in accordance with governing Commission rules mandating the immediate effect of initial decisions, that Cablevision restore GSN to full carriage "as soon as practicable" and that Cablevision pay the maximum forfeiture permitted by statute.

Cablevision paid no attention to the ordering paragraphs of the ALJ's ruling. GSN has been forced to seek relief from the Commission in the form of its pending petition to compel compliance, which has been briefed separately. Implicitly recognizing that its failure to comply was without legitimate legal basis, Cablevision has now filed a petition for a stay of the Initial Decision pending review by the Commission of its Exceptions to the Initial Decision.

The Commission has recognized that a stay is an "extraordinary remedy," to be granted only in very limited circumstances. In particular, a showing of irreparable injury is a "critical element" in justifying a request for stay of an agency order and such a showing may be made only where the movant shows that irreparable harm is both "certain" and "great." Those interests are heightened in Section 616 proceedings where granting a stay undermines congressional and Commission policies favoring swift resolution of discrimination complaints, and where the only meaningful relief available to a complainant such as GSN is a mandatory carriage order—precisely the relief that Cablevision seeks further to delay.

A stay is completely inappropriate here. The ALJ found unequivocally and on multiple, alternative bases that Cablevision violated Section 616 when it retiered GSN. To overcome the ALJ's clear factual findings to obtain a stay, a movant must meet all four of the basic tests governing stay requests. In light of the record evidence supporting the ALJ's findings, Cablevision cannot satisfy any—let alone all—of the four elements required for a stay because (1) it makes no showing of irreparable harm, (2) the ALJ made specific findings that a stay would irreparably harm GSN, (3) it makes no meaningful showing of likely success on the merits, and (4) a stay would not serve the public interest.

First and most important, Cablevision has not shown that it is possible that it would suffer *any* irreparable injury absent a stay, let alone that such harm would be "certain" and "great." Its protestation that its due process rights would be violated if the decision is implemented before the Commission hears its First Amendment and statute of limitations arguments borders on the frivolous; both legal arguments have been rejected repeatedly by the Commission, and Cablevision offers nothing to contradict the settled law. Its other asserted harms are, at most, economic and administrative costs that accompany any change in carriage and are, by definition, not irreparable. As Cablevision fails to demonstrate *any* irreparable harm, it cannot merit a stay; that should end the Commission's inquiry.

Second, while the record shows no harm to Cablevision from enforcing the decision, the ALJ held explicitly that GSN is harmed irreparably each day that Cablevision's discrimination continues. Those harms extend beyond the economic impact of lost license fees and include irremediable damage to GSN subscriber bases, ratings, and advertiser bases, its negotiating position with other MVPDs, and its ability to compete for viewers and advertisers with similarly situated networks. Cablevision simply ignores that the ALJ made these detailed factual findings, which are entitled to deference and favor immediate enforcement of the ALJ's decision.

Third, even ignoring the harm analysis, GSN, not Cablevision, is likely to succeed on the merits. The ALJ found GSN provided persuasive direct and circumstantial evidence that Cablevision discriminated against GSN and in favor of its affiliates. Each of Cablevision's legal arguments has been rejected previously, and its attempts to breathe new life into those arguments do nothing to change the settled law. There simply is no basis for the Commission to conclude that Cablevision would be likely to prevail on the merits of its appeal.

Fourth, the public interest is disserved by allowing Cablevision to continue discriminating while it exhausts administrative review. Section 616 reflects a legislative determination that the public interest is so importantly served by increasing programming diversity and competition that expedited review of claims of violations of the statute is required. The Commission's rules clearly contemplate similar expedition. Enforcing the ALJ's order now is therefore directly consistent with the goals inherent in Section 616. Therefore, the public interest in addressing what the ALJ found to be unlawful discrimination should be vindicated without further delay.

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Background

GSN refers to the background set forth in its pending Petition to Compel Cablevision's Compliance with the Initial Decision and its Reply to Cablevision's Exceptions, both of which are hereby incorporated by reference.[1]

In his Initial Decision released November 23, 2016, the ALJ found that GSN satisfied its burden of proof of a Section 616 violation on multiple, alternative bases.[2] He first found that GSN proffered credible direct evidence that Cablevision applied rules to GSN that it simply did not apply to its affiliated networks and admitted that those rules were applied on the basis of affiliation. In particular, Cablevision as a matter of practice retiered only non-affiliated networks having expired or expiring contracts; gave no consideration to retiering any of its affiliated networks, including those that also had expired or expiring carriage agreements; and applied a discriminatory programming test to continued carriage of GSN that it never applied to its affiliates.[3]

The ALJ was also persuaded by GSN's circumstantial evidence of discrimination.[4] He found that GSN was similarly situated to Cablevision's affiliates WE tv and Wedding Central. He noted that these three networks carried similar programming, appealed to the same target audience, and sought to sell advertising targeted at the same demographics and to many of the same advertisers.[5] He found that Cablevision's retiering decision had no legitimate business justification because Cablevision would have saved more by retiering its affiliates; that its

[1] *See generally* GSN Reply to Cablevision Exceptions (filed Jan. 13, 2017); GSN Pet. to Compel (filed Dec. 8, 2016).
[2] *See* Initial Decision, at ¶ 99.
[3] *See id.*, at ¶¶ 100-109.
[4] *See id.*, at ¶¶ 110-114.
[5] *See, e.g., id.*, at ¶¶ 110-111.

affiliates did not perform as well as or better than GSN by the standards normally used to assess competing networks;[6] that the justifications it offered for retiering GSN such as cost-cutting plainly were pretextual; and that it lost subscribers, money, and goodwill from retiering GSN. [7] He therefore correctly inferred that the differential treatment of GSN by Cablevision was a result of a discriminatory intent.[8]

The ALJ held that GSN suffered—and continues to suffer—actionable harm resulting from Cablevision's discrimination. In particular, he found substantial ongoing losses to GSN in terms of subscribers, license fee revenue, ratings, advertising revenue, and negotiating position with other MVPDs; in the ability to compete with similarly situated networks for viewers and advertisers; and in its ability to commission original programming.[9]

On the basis of these findings, the ALJ ordered that Cablevision restore GSN to the expanded basic distribution tier "as soon as practicable", among other relief.[10] Cablevision failed to comply with the ALJ's Order. Instead, it forced GSN to move for its compliance via the currently pending petition to compel. Cablevision has now filed an opposition to the petition to compel as well as this petition for a stay pending Commission appeal. It has thus made clear that it will not comply with the ALJ's Order in a timely manner, or at all, unless ordered to do so.[11]

[6] *See id.*, at ¶¶ 29, 37, 103.
[7] *See, e.g.*, Initial Decision, at ¶¶ 48 (loss of subscribers), 64 n.325 (incremental loss), 104 (loss of subscribers, goodwill), 102-08 (pretext), 112 n.510 (Cablevision expert admits it would have saved more by tiering affiliate WE tv than it did by tiering GSN).
[8] *Id.*, at ¶¶ 110-114.
[9] *Id.*, at ¶¶ 88-90, 110-14; Goldhill Tr. 234:9-21, 235:11-15.
[10] Initial Decision, at ¶¶ 124-26.
[11] *See, e.g.*, Cablevision Stay Pet., at i (arguing Commission's rules and precedents "preclude the implementation of the Initial Decision until after . . . full Commission review.")

Cablevision offers no reason why, as a technical matter, it cannot restore GSN to the expanded basic tier.

Argument

A stay is "extraordinary relief."[12] When seeking a stay, the "movant has the burden to show that all four factors, taken together, weigh in favor" of the relief requested.[13] Only when these factors "are 'heavily tilted in the movant's favor' is the extraordinary relief of a stay appropriate."[14] The burden is particularly heavy in a case such as this where the Commission has chosen, as a policy matter, to adopt rules that require the public interest benefits of a service restoration order be achieved immediately and has warned that stays of remediation orders should not be expected.

Cablevision cannot meet *any* of the four exacting factors[15] the Commission requires to impose a stay, let alone the heightened showing it must make with respect to the other factors if—as here—it fails persuasively to establish a likelihood of irreparable injury to itself by reason of implementation of the ALJ's Order. *First*, Cablevision does not demonstrate it will suffer *any* harm from restoring GSN to the carriage it enjoyed prior to the discriminatory tiering act, let

[12] *Tropical Radio Telegraph Co. Authorization to Acquire and Operate One Satellite Voice Circuit for the Rendition of Record Services Between the United States and Italy and Beyond*, Mem. Op. & Order, 36 FCC 2d 648, 648 ¶ 3 (1972).
[13] *See Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (setting forth standard for preliminary injunction that is identical to standard for a stay).
[14] *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, FCC 02-90, 17 FCC Rcd. 6175, 6177 ¶ 6 (2002).
[15] *See In the Matter of AT&T Corp.*, 13 FCC Rcd. 14508, 14515 (1998) (listing the criteria to be considered as "(1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the issuance of the order will further the public interest").

alone the "certain", "great," and "irreparable" harm required for a stay.[16] That failure is compounded with due regard to the second factor: The ALJ concluded that *GSN*'s continuing injury by reason of Cablevision's discrimination causes it substantial and immediate competitive damage that cannot be remediated in a other than through expanded carriage on Cablevision systems. When the balance of harms leans heavily toward the petitioner, the inquiry should end and the stay should be denied. But it is also clear that Cablevision cannot make the required showing that it is likely to succeed on the merits, especially since the ALJ found that its discriminatory acts lacked "any valid business reason,"[17] and since the public interest strongly favors immediate compliance with the program carriage regulations.[18] Cablevision's petition should be denied.

I. CABLEVISION FAILS TO SHOW ANY IRREPARABLE HARM RESULTING FROM THE ENFORCEMENT OF THE INITIAL DECISION.

Cablevision fails to demonstrate *any* of the harms it asserts will be irreparable or sufficiently severe to merit a stay pending its appeal. That deficiency alone is enough to deny its stay request because "a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order."[19] In order to obtain a stay, Cablevision must show its claim is both "certain and great; it must be actual and not theoretical."[20]

[16] *See Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).
[17] Initial Decision, at ¶ 101 (finding that Cablevision, "without any valid business reason, tagged GSN for retiering" based on GSN's non-affiliation with Cablevision).
[18] *See* Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 1160 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133 (noting the importance of "ensur[ing] that cable operators do not favor their affiliated programmers over others").
[19] *In the Matter of Tennis Channel, Inc., Complainant*, 27 FCC Rcd. 9274, 9279 (2012) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)) [hereinafter, "*Tennis Channel*"]; *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)).
[20] *Wisconsin Gas Co.*, 758 F.2d at 674.

Cablevision makes no showing of *any* cognizable harm, let alone a harm that meets this exacting standard. *First*, Cablevision suggests that its expressive rights under the First Amendment are being overrun by the ALJ's carriage order. But as the Commission found with respect to a similar argument for a stay, Cablevision's "mere assertion of a First Amendment violation, without more, does not demonstrate irreparable injury."[21] Even a well-stated First Amendment argument would not be sufficient to impose a stay. But here, as discussed in section III.E below, the Courts and the Commission have repeatedly rejected the very argument that Cablevision makes here, for example that Section 616 violates First Amendment requirements because it compels an MVPD to carry content that it is opposed to carrying for any expressive purpose. Here, that argument is particularly hollow. Cablevision carried GSN's signal on its broadly penetrated tier for nearly 14 years and has carried it on a tier accessible to all of its subscribers willing to pay a premium for it throughout the pendency of this action. Cablevision cannot demonstrate an irreparable harm to its First Amendment rights during the pendency of its Commission appeal.

Second, the Commission has held that "even substantial injuries in terms of money, time and energy expended in the absence of a stay are not adequate grounds to justify a stay."[22] And Cablevision's remaining assertions of harm—"regulatory and customer notification

[21] *Tennis Channel*, 27 FCC Rcd. at 9286 (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury . . . . Rather the plaintiffs must show 'a chilling effect on free expression."')).
[22] *Auction of Interactive Video and Data Service Licenses Scheduled To Begin Feb. 18, 1997*, DA 97-13, Order, 12 FCC Rcd. 19, 21 ¶ 5 (1997) (citation omitted).

requirements, administrative costs . . . , and . . . loss of customer goodwill" [23] merely state harms that are economic in nature and cannot constitute the irreparable harm that would justify a stay.[24]

The record is devoid of any showing that the administrative and other costs of notifying Cablevision's subscribers and regulators about a change in carriage of GSN are any different or more onerous than those caused by changes Cablevision makes to its channel offerings in the ordinary course of business.[25] Instead, the record shows that the Initial Decision merely ordered Cablevision to carry GSN on the same tier, to the same subscriber base, and at the same rate as Cablevision carried GSN prior to 2011.[26] Implementation of the Initial Decision requires nothing more than would the usual decision by an MVPD to add a network or alter its program package.[27] In light of Cablevision's complete failure to meet its burden as to harm, its stay petition must be denied.

II. THE ALJ FOUND THAT GSN WILL SUFFER IRREPARABLE HARM IF A STAY IS GRANTED.

Cablevision simply ignores the ALJ's findings that the status quo forces GSN to incur continued and irreparable harm by virtue of Cablevision's discrimination. A simple suggestion

[23] Cablevision Pet. for Stay, at 22. Cablevision attempts to prove the extent of these harms through the affidavit of Cablevision executive Michael Schreiber. *See id.*, Ex. A. The Schreiber Affidavit was submitted after the close of evidence, is outside the record, and has not been subject to cross-examination. It should not be considered.

[24] *See, e.g., Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) ("harms . . . economic in nature . . . not generally irreparable.").

[25] Likewise, Cablevision also fails to explain why offering its customers an additional channel will result in "loss of customer goodwill. Cablevision's admission that consumer anger is a likely result of moving GSN back to a more narrowly-penetrated tier if the ALJ's decision is subsequently reversed merely bolsters the ALJ's finding that there was no valid business rationale for the retiering in 2011.

[26] Initial Decision, at ¶¶ 124-26.

[27] *Tennis Channel*, 27 FCC Rcd. at 9287 (denying stay because, *inter alia*, "[i]mplementation of this relief requires nothing more than the type of business decision Comcast makes routinely with many channels.") (citation omitted).

that a program service is not irreparably injured by a delay in the effectiveness of a carriage remediation order was rejected by the Commission through its General Counsel (acting on delegated authority in the *Tennis Channel* case). There it denied a stay and noted that "if maintaining the status quo were justification for granting a stay request, every request would be granted because any grant of a stay maintains the status quo."[28]

GSN has not only met its burden to show it faces irreparable harm, but the ALJ has issued detailed findings to that effect. In sum the ALJ found that Cablevision's retiering decision resulted in substantial losses to GSN in subscribers, license fee revenue, ratings, and advertising revenue, and adversely affected its standing in the eyes of other MVPDs, and its ability to compete with similarly situated networks—all of which amounted to an unreasonable restraint on GSN's ability to operate fairly in both the New York and national markets.[29]

Thus, GSN's ongoing losses of approximately [redacted] in annual licensing revenue and [redacted] in annual advertising revenue impede GSN's ability to compete effectively in the marketplace—a harm that is, in its own terms, irreparable and irremediable: once lost, these remedies can never be recouped for the period when GSN was carried on the sports tier.[30] Continuing losses to GSN have a measurable impact on GSN's ability to invest in programming, marketing, and talent, and even Cablevision has not contested the record evidence on these points.[31] The evidence is clear that the revenue loss impacts GSN's ability to develop and launch original programming, which brings in new audiences, drives advertising revenue,

[28] *Id.* at 9290.
[29] *See generally* Initial Decision, at ¶¶ 99-116.
[30] Initial Decision, at ¶¶ 88-90, 115.
[31] Goldhill Tr. 234:9-21, 235:11-15.

and produces the content diversity that is the very goal of Section 616.[32] The ALJ found the tiering also unreasonably restrained GSN's ability to compete in New York communities, which are of special significance to the advertising marketplace.[33] These considered findings of irreparable harm to GSN's ability to compete overwhelm Cablevision's bare assertions of inconvenience and routine costs that would arise from its compliance with the ALJ's order. And the harm to GSN can only be remediated by making effective the ALJ's order requiring service be restored as quickly as practicable.

Cablevision's suggestion that "GSN has thrived" since the retiering is irrelevant.[34] GSN's success in spite of Cablevision's discrimination shows only the strength of GSN's management and its viewer popularity. Cablevision does not dispute the ALJ's findings that GSN's ability to compete would have been reasonably stronger absent the retiering.[35]

Finally, Cablevision's suggestion that a stay should not issue because "GSN's own strategic decisions" delayed the proceedings is meretricious. GSN filed its complaint on October 12, 2011, well within the one year statute of limitations following the retiering by Cablevision.[36] Since then, the only major delays in the action came at the mutual request of the parties and arose from the DC Circuit's resolution of the *Tennis Channel* matter—a case whose decision, in

[32] *Id*.
[33] GSN Exh. 301, Singer Written Direct ¶ 115.
[34] *See* Cablevision Stay Pet., at 24.
[35] By contrast, the uncontested record evidence is that Cablevision and its owners profited handsomely during the period in which GSN had been tiered. In fact, its controlling shareholders in the Dolan family took $56 million in dividend and non-dividend payments from Cablevision in 2010—the year when Cablevision claimed it was in financial distress and another $56 million from Cablevision in 2011—the year GSN was retiered. *See* GSN Exh. 401A (chart summarizing data from Cablevision financial disclosures for the years 2009-2014); *see also* Montemagno Tr: 1583:21-1590:25.
[36] *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Program Carriage Complaint (filed Oct. 12, 2011); Initial Decision, at ¶ 1.

fact, altered the applicable evidentiary tests in a Section 616 case.[37] In fact, the ALJ agreed with the wisdom of that delay, and the parties engaged in further discovery pursuant to the ALJ's order in part to address the issues restored by the D.C. Circuit's decision.

III. GSN—NOT CABLEVISION—IS LIKELY TO SUCCEED ON THE MERITS.

Cablevision's standard of proof for the likelihood of success on the merits "varies with the quality and quantum of harm that [the movant] will suffer from the denial of an injunction."[38] Where—as here—"it appears that a lack of showing of irreparable damage exists . . . the party seeking a preliminary injunction has a burden of convincing with a *reasonable certainty* that it must succeed at (the) final hearing."[39] In considering the likelihood of success, the Commission looks to the "extensive record developed in this proceeding" and the ALJ's "careful analysis" of that record.[40]

Cablevision cannot provide a "reasonable certainty," or even a likelihood, that it will succeed on the merits of its appeal against that standard before the Commission.

A. The Initial Decision Correctly Found Direct Evidence of Cablevision's Discrimination.

Cablevision first criticizes both the legal standard the ALJ applied in accepting GSN's direct evidence of Cablevision's discrimination and the sufficiency of the evidence supporting his conclusions. But the ALJ made exhaustive findings with respect to direct evidence, and those findings meet the well-established definition of direct evidence.

[37] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Order, FCC 13M-7 (ALJ Mar. 26, 2013); *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Order, FCC 13M-12 (ALJ June 25, 2013).
[38] *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) (citation and quotation marks omitted).
[39] *Id.*
[40] *See Tennis Channel*, 27 FCC Rcd. at 9282-83.

Cablevision argues that the findings are in fact not direct evidence of discrimination but in fact, at best, circumstantial evidence—since they do not constitute explicit "admission[s]" of wrongdoing that require no "inferential leap."[41] On Cablevision's theory, a company could direct all female employees to take an impossibly difficult examination, exempt the male employees from that test, and then fire any female employees who failed that test. It would escape liability for its discrimination because no executive had written a memo saying that gender discrimination was the goal of the disparate test requirement. The law is clear that direct evidence includes that which presents facts that *compel* the conclusion that unlawful discrimination was "at least a motivating factor in the relevant decision."[42] Thus, an admission that a company followed an "an existing policy which itself constitutes discrimination is direct evidence of discrimination."[43]

The ALJ found numerous examples of exactly those kinds of policies and of Cablevision's repeated explicit admissions that the policies were followed when he considered the ways in which Cablevision treated its own networks and networks that were unaffiliated with it..[44] For example, prior to the tiering, Cablevision refused to meaningfully negotiate with GSN

[41] *See* Cablevision Stay Pet., at 8-9.
[42] *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394-95 (6th Cir. 2008) (characterizing direct evidence of discrimination as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions"); *Neufeld v. Searle Labs.*, 884 F.2d 335, 339 (8th Cir. 1989) (holding that "repeated approval of [an] . . . apparent policy of systematic age discrimination alone provides ample direct evidence").
[43] *E.E.O.C. v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996) (citation and quotation marks omitted); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985) ("[D]irect proof of age discrimination" existed where airline applied a different test for a captain's eligibility for transfer to older captains than it applied to younger captains).
[44] *See, e.g.*, Initial Decision, at ¶¶ 14, 101 (affiliate relationships not conducted at arm's length, affiliates could take disputes with carriage arm to the COO); 102 (no consideration given to

over a new contract, leaving GSN in a situation where it was easier to retier the network. Yet Cablevision took careful steps to ensure that its distribution executives [redacted]—that they never put their own networks in that situation ; those executives could not negotiate with affiliates at arm's length[45] While it considered retiering GSN, Cablevision followed its practice of *never* considering retiering or dropping an affiliate.[46] Instead, Cablevision's President applied a discriminatory "must-have" programming test that he did not apply to Cablevision affiliates, and as to which the President reluctantly admitted a number of the affiliated networks would likely fail.[47] And, following the retiering, Cablevision made clear that nothing—including the unprecedented consumer outcry it faced or further concessions by GSN—would cause it to reconsider its tiering decision.[48] Instead, Cablevision walked away from negotiations with GSN, [redacted][49] The ALJ correctly held that the admitted application of discriminatory policies only to non-affiliates constituted direct evidence of discrimination.[50]

B. The Initial Decision Correctly Found Circumstantial Evidence of Discrimination and Correctly Applied the *Tennis Channel* Precedent.

The ALJ independently found that the record was replete with *circumstantial* evidence of discrimination more than sufficient to establish a violation of Section 616—i.e., that Cablevision

retiering affiliates), 33 nn.148 (GSN kept out of contract), 152 (no consideration to retiering or dropping affiliates).

[45] Initial Decision, at ¶¶ 14, 101.

[46] Initial Decision, at ¶¶ 101, 102, 33 nn.148, 152, 34 n.155.

[47] *See* Joint Exh. 1, Bickham Dep. 107:14-19.

[48] Initial Decision, at ¶¶ 40, 83, 100 n.444 (citing *In the Matter of Herring Broad., Inc. d/b/a Wealthtv, Complainant*, 24 FCC Rcd. 12967, 12998 (2009)) ("direct evidence" includes "statements showing a discriminatory intent.").

[49] Montemagno Tr. 1546:22-1547:6, 1545:2.

[50] *See, e.g., Trans World Airlines*, 469 U.S. at 121-22 (differential and discriminatory test applied to employees constituted direct evidence of age discrimination).

treated its similarly-situated affiliated networks differently than it treated GSN and that discriminatory intent could be inferred from evidence that Cablevision lacked a "reasonable business purpose" for these acts.[51] Cablevision challenges the evidence supporting the ALJ's findings as to similarity and his legal analysis with respect to lack of business purpose. Both will fail upon full Commission review.

1. The Initial Decision Correctly Found that GSN and Cablevision's Affiliates WE tv and Wedding Central were Similarly Situated.

Cablevision argues it will succeed on the merits because the ALJ erred in concluding that WE tv and GSN were similarly situated.[52] But Cablevision's defines "similarly situated" too narrowly, and it fails to demonstrate why the Commission should disregard the ALJ's consistent and persuasive credibility determinations with respect to the extensive record evidence supporting this finding.

The ALJ found that the preponderance of evidence demonstrated that GSN, WE tv, and Wedding Central were and are similarly situated "women's networks," appealing "primarily to women."[53] He accepted as "persuasive" expert testimony that "a network with an audience that is 70 percent female is '[d]efinitely' a women's network," and "at the time of GSN's retiering 'approximately 70 percent of [GSN's] audience was a female audience;'"[54] and WE tv (and

[51] *See* Initial Decision, at ¶¶ 110-14; *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) [hereinafter, "*Comcast Cable*"]; *see also TCR Sports Broad. Holding v. Time Warner Cable Inc*, 25 FCC Rcd. 18099, ¶ 1 (2010).
[52] Cablevision Stay Pet., at 12-14.
[53] Initial Decision, at ¶ 51 (citing Tr. at 1161:20-22, 1326:10-25).
[54] *Id.* (citing Tr. 1326:22-25, 1140:19-20).

Wedding Channel's) audiences similarly skewed female.[55] In addition, the ALJ determined that undisputed evidence proved "clearly and convincingly" that all three networks targeted the same specific demographics of women 25 to 54 and women 18 to 49.[56] Furthermore, the ALJ concluded that the substantial record demonstrated that though there were differences in genre emphasis, the three networks all offered overlapping "women-oriented programming," which centered on families and relationships.[57]

Cablevision argues that the ALJ erred because he maintained a "myopic focus on target audience" and ignored other "significant evidence" that the networks were different.[58] Its position misapplies the well-articulated standard for finding networks are similarly situated: The Commission must look at "a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors," and "no single factor is necessarily dispositive."[59] Cablevision now selectively points the full Commission to certain factors that the ALJ considered—and found less probative or non-credible—while ignoring the ALJ's well-reasoned analysis.

Thus the ALJ concluded that the preponderance of evidence, including "unequivocal[]" testimony, "clearly and convincingly" proved GSN, WE tv, and Wedding Central targeted the

[55] *Id.*, at ¶ 51. n.250 (explaining evidence in the record showing WE tv's audience was 78% female and Wedding Central's female audience was similar at time of GSN's retiering).
[56] *Id.*, at ¶ 65.
[57] *Id.*, at ¶¶ 59-64 (explaining programming similarities, including that contestants from WE tv's "marquee" *Bridezillas* were featured on GSN's marquee *The Newlywed Game*).
[58] Cablevision Stay Pet., at 13.
[59] *Id.*; *see also* Initial Decision at 60 n.5 (citing *Cordi-Allen v. Conlon*, 494 F.3d 245, 254-255 (1st Cir. 2007) ("[T]he 'similarly situated' requirement . . . properly understood, does not demand identicality.")).

same women viewers.[60] There was "no doubt."[61] He credited and found persuasive evidence demonstrating that GSN's target programming, like that of WE tv and Wedding Central, consisted of women-oriented shows.[62] As to programming genre, Cablevision now argues that the ALJ erred because he disregarded the genre analysis by Cablevision's expert, Michael Egan.[63] This is essentially an argument that a network featuring women's oriented entertainment content cannot be similarly situated with a network that offers game shows. The ALJ *did* consider the analysis and determined it not was not credible, instead favoring the analysis of GSN's expert Mr. Brooks who demonstrated why a game show network and a women's entertainment network could—and did—compete for audience and advertisers.[64] The ALJ also credited substantial evidence showing that GSN, WE tv, and Wedding Central's advertising strategies and reach demonstrated they were substantially similar.[65] Not only did the ALJ find that GSN and the other networks sold advertising based on the same female demographics,[66] but he also found probative that they featured the same top advertisers.[67]

[60] Initial Decision, at ¶ 65.
[61] *Id*., at ¶ 66.
[62] *Id*., at ¶¶ 59-64.
[63] Cablevision Stay Pet., at 14. Apart from citing testimony about the number of game shows WE tv carried, *see id*. 14 n.72, Cablevision fails to explain why Egan's arguments about amount of game show programming should be more probative than the ALJ's findings regarding other programming commonalities.
[64] Initial Decision, at ¶ 62 ("Egan's overarching assertion that game show programming is distinct and mutually exclusive of reality competition programming is rejected as not credible and contradicted by the preponderance of substantial record evidence.").
[65] Initial Decision, at ¶¶ 71-77.
[66] *Id*., at ¶ 75 (explaining two-thirds of GSN's demographic advertising sales at the time of retiering were for "persons and women 18 to 49 and 25 to 54" and that at the same point in time "women 25-54 alone accounted for nearly 40 percent of GSN's upfront advertising sales").
[67] *Id*., at ¶ 77.

In its Petition to Stay, Cablevision largely ignores these arguments and merely claims the ALJ should have given more weight to other factors, such as carriage agreements and company classifications.[68] Whatever relevance these materials may bear on the a finding of similarity, Cablevision's conclusory statements about the ALJ's "myopic focus" cannot succeed in overturning the ALJ's well-reasoned conclusions.

2. GSN Met the *Tennis Channel* Evidentiary Standard to show the retiering decision was not based on a "reasonable business purpose."

GSN also met the test for showing that the decision to retier it was not based on a "reasonable business purpose."[69] Before the *Tennis Channel* opinion, a complainant could establish circumstantial evidence of discrimination based solely on evidence that an MVPD offered its similarly situated affiliates preferential treatment.[70] To that analysis, the D.C. Circuit concluded that an unaffiliated network's claim that a discriminatory action lacked a valid business purpose could not be upheld unless it also showed (1) that the MVPD would have obtained a "net benefit" from carrying the complainant network fairly; (2) that the MVPD incurred an equal or greater loss from favoring its affiliated networks than it would have incurred from continuing to treat the unaffiliated network equally; or (3) that the MVPD's proffered business justification(s) were pretextual.[71]

[68] Cablevision Stay Pet., at 13-14. Cablevision, for instance, claims DIRECTV's classification of GSN for advertising as an "adults" network differentiates it from WE tv. *Id.* Yet, Cablevision does not explain why such data points should receive more weight than the evidence the ALJ found probing showing that that women 25 to 54 accounted for nearly [redacted] percent of GSN's advertising sales at the beginning of a television season. *See* Initial Decision, at ¶ 75.
[69] *See Comcast Cable*, 717 F.3d, at 985.
[70] *Tennis Channel, Inc. v. FCC*, 827 F.3d 137, 143 (D.C. Cir. 2016).
[71] *See Comcast Cable*, 717 F.3d at 985-87.

GSN met all three tests. *First*, the ALJ made express findings sufficient to support the incremental loss theory. He found, and noted that Cablevision did not dispute, that Cablevision "would have saved significantly more by retiering one of its affiliated networks, including WE tv."[72] Yet Cablevision never considered tiering WE tv.[73] Indeed, one month after placing GSN on the sports tier, Cablevision entered a new affiliation agreement with WE tv that guaranteed WE tv carriage on a highly penetrated tier.[74]

Second, the ALJ made specific and repeated factual findings that Cablevision's proffered justifications for the retiering were mere pretexts for discrimination. He specifically rejected as pretext Cablevision's assertions that (1) GSN was tiered to cut costs; (2) GSN alone failed to meet a "must-have programming" test; (3) GSN was tiered because it was out of contract and Cablevision was prevented by contract from retiering its affiliates; or (4) GSN was a "weak network," especially as compared to Cablevision's WE tv.[75]

Third, GSN met the "net benefit" test by establishing that Cablevision lost money by tiering GSN,[76] in light of the overwhelming market consensus on GSN's value as a network.[77] Among other record evidence, GSN's expert, Dr. Singer, quantified Cablevision's losses due to

[72] Initial Decision, at ¶¶ 39, 64 n.325, 107 n.490, 112 n.510.
[73] Joint Exh. 1, Bickham Dep. 64:1-8; 104:4-105:6; Joint Exh. 3, Dolan Dep. 133:10-15.
[74] GSN Exh. 202, at CV-GSN 0361453, 0361470.
[75] *See* Initial Decision, at ¶¶ 27 (noting first discussion of retiering GSN was not the result of cost-cutting pressure), 45, 102, 105 (cost-cutting rationale belied by the fact that GSN represented a small portion of Cablevision's programming budget).
[76] *See id.*, at ¶ 48 (finding Cablevision lost approximately 5,000 subscribers).
[77] *See id.*, at ¶ 80 ("[D]iametrically contrary to Cablevision's assertion that GSN was retiered because it was a weak and unpopular network, the preponderance of evidence proves beyond any equivocation that GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers."); *see also* GSN Exh. 297, Goldhill Written Direct ¶ 23.

subscriber churn and diminished goodwill that resulted from the tiering decision,[78] and found those losses outweigh what Cablevision claims to have saved from the tiering.[79] Adverse subscriber reaction to the retiering of GSN was unique in Cablevision's history, and it overtly worried about the impact of the change on subscriber goodwill and was forced to subsidize several thousand subscribers threatening to leave because of the decision.[80]

C. The Initial Decision Correctly Held that Cablevision Interfered with GSN's Ability to Compete Effectively.

The Presiding Judge correctly applied the standard for harm articulated by the Commission and found, based on the preponderance of substantial and undisputed evidence, that Cablevision's discriminatory conduct "significantly and negatively impacted GSN's advertising and license fee revenue and unreasonably restrained GSN's ability to compete fairly against other female-targeted networks, including similarly-situated WE tv."[81] As noted in Section II above, the uncontroverted evidence demonstrates that Cablevision's conduct resulted in substantial losses to GSN in subscribers, license fee revenue, ratings, advertising revenue, negotiating position with other MVPDs, and ability to compete with similarly situated networks

[78] Cablevision also asserts that under *Tennis Channel*, "the ALJ was required . . . to determine if GSN had put forth evidence showing that Cablevision would receive a 'net benefit' by continuing to carry GSN" but that the ALJ failed to undertake that analysis. Cablevision Stay Pet., at 11. While the ALJ noted that his finding of direct discrimination eliminated the need to reach the "net benefit test,"[78] he nevertheless made the factual findings described above that are sufficient to establish that GSN had in fact met that test. Initial Decision, at ¶ 86 ("In light of the foregoing finding of intentional discrimination, the Presiding Judge need not reach the alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN from the expanded basic tier to the premium sports tier.").

[79] GSN Exh. 301, Singer Written Direct ¶¶ 81-84 (calculating that combined monthly losses to GSN due to lost customers and lost goodwill significantly exceed the amounts Cablevision claimed to have saved from the tiering).

[80] See GSN Reply to Exceptions, Part I.B.1.

[81] Initial Decision, at ¶¶ 87, 115.

— all of which amounted to an unreasonable restraint on GSN's ability to compete fairly in both the New York and national markets.[82]

Cablevision should not be heard to argue that the harm suffered by GSN, a single, small, independent network, was not significant enough to restrain its ability to compete but that, at the same time, the money Cablevision saved simply from retiering GSN was "not an insignificant number" and was a "material amount of money" affecting its more sizable bottom line.[83] GSN lost [redacted] of its annual advertising revenue and [redacted] of its subscribers as a direct result of Cablevision's retiering, while Cablevision saved [redacted] of its annual programming budget by moving GSN—which was the only network Cablevision moved as part of its so-called cost-saving plan.[84]

The tiering also unreasonably restrained GSN's ability to compete in the New York DMA, which is of special significance in the competitive advertising marketplace, as well as in Cablevision's local coverage area, where Cablevision serves 61 percent of homes.[85] The Presiding Judge found that in the New York DMA (which includes both Cablevision's local coverage area and additional areas), GSN suffered a decline of 60 percent in household viewership following the tiering and a decline of 80 percent to 90 percent in viewership among its principal female demographics.[86] He agreed that this level of potential audience loss would

[82] Initial Decision, at ¶¶ 88 (GSN lost approximately [redacted] in annual licensing revenue), 89 (loss of [redacted]), 90 (loss of at least [redacted] in annual advertising revenue).
[83] *See* Cablevision Exceptions at 11 & n.55; *see also* GSN Exh. 351, at 37 (Cablevision Securities and Exchange Commission Form 10-K for the fiscal year ended December 31, 2013, showing that in 2011, the year of the tiering, Cablevision reported net revenue of $6.1 billion).
[84] Initial Decision, at ¶¶ 89, 90, 116.
[85] GSN Exh. 301, Singer Written Direct ¶ 115.
[86] Initial Decision, at ¶ 90.

be devastating, particularly in New York, which was home to a concentration of national advertising executives.[87]

In an effort to insulate itself from any remedy for its illegal discrimination, Cablevision asserts that the Commission should apply a national antitrust test to each program carriage case, a request the Commission has consistently rejected. The Commission has held that "Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the 'essential facilities' doctrine."[88] A national antitrust test would also exempt regional and local MVPDs from any application of Section 616, which was not Congress's intent. As this Commission found, "Congress applied Section 616 to *all* MVPDs…."[89]

What matters under the law is whether the conduct of the MVPD unreasonably restrained the ability of the unaffiliated programmer to compete fairly in the MVPD's market. Cablevision commands 61 percent of the market in the communities it serves.[90] As the Second Circuit has found in related matters, it is reasonable to infer that "a vertically integrated cable operator with a significant share of an MVPD market will have the incentive and ability to prevent unaffiliated networks from competing fairly [there]."[91]

Cablevision looks for support for its theory in the concurring opinion of Judge Kavanaugh in the *Tennis Channel* case.[92] But Judge Kavanaugh's theory was not adopted by the

[87] *See, e.g.*, GSN Reply to Exceptions, at 33.
[88] *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, 27 FCC Rcd. 8508, 8523 (2012).
[89] *Id.* (emphasis added).
[90] GSN Exh. 301, Singer Written Direct ¶ 115.
[91] *Time Warner Cable v. FCC*, 729 F.3d 137, 163 (2d Cir. 2013).
[92] Cablevision Petition to Stay, at 15-16 (quoting *Comcast Cable*, 717 F.3d , at 988, 992-94 (Kavanaugh, J., concurring)).

court. And even Judge Kavanaugh acknowledged that "[i]n some local geographic markets around the country, a video programming distributor may have market power."[93] Such is the case with Cablevision in New York.

D. Cablevision's Change in Ownership is Not Relevant to Its Likelihood of Success on the Merits or to its First Amendment Argument.

Cablevision seeks to persuade the Commission that its merger several months ago with Altice N.V. eliminates "whatever government interest might have once been invoked to justify broad carriage of GSN."[94] Cablevision raises the ownership issue now, many months after it could have first raised it and without providing the Commission with a persuasive reason to consider a matter that could have been brought before the ALJ for consideration of whether it affected any aspect of this decision.

Cablevision makes no argument that the case has been mooted by the ownership change, and it could not do so. And while it suggests that it is significant that Altice-controlled Cablevision is no longer vertically integrated, it does not suggest that the ALJ or the Commission lack the power to pose a carriage remedy upon Cablevision for its behavior during the time when it was. Nor does Cablevision seek to use the ownership change to challenge any aspect of the ALJ's fact findings, his imposition of a forfeiture, or any element of the Order other than his imposition of a requirement of carriage Significantly, Altice accepted responsibility for Cablevision's liabilities—necessarily including this litigation and any potential remedies flowing from it—by virtue of its merger with Cablevision.[95] Cablevision simply cannot evade the

[93] *Comcast Cable*, 717 F.3d at 992 n.3 (Kavanaugh, J., concurring).
[94] Cablevision Stay Pet., at 17.
[95] *See* Agreement and Plan of Merger Among Cablevision Systems Corp., Altice N.V., and Neptune Merger Sub Corp. ("Merger Agmt.") § 1.1 (Sept. 16, 2015) (noting continuity of

enforcement of the portion of the order it does not like by using its change of ownership as a shield. The ALJ imposed the carriage order not to punish Cablevision or Altice. Rather, it must be taken as intended to redress the competitive imbalance Cablevision's discrimination caused, and to restore GSN to its rightful opportunity to compete effectively in the nation's largest television market. The Commission had found in other contexts that steps taken by a licensee following a violation"—including changes in ownership—"do not eliminate the licensee's responsibility for the period during which the violation occurred."[96] Here the responsibility leads directly to a remedial carriage order.

E. Cablevision's First Amendment Challenge Has Been Repeatedly Rejected and is Without Merit.

Cablevision insists that its arguments regarding the First Amendment are novel, yet in reality they are the same arguments that have been rejected repeatedly by the Courts and the Commission, dressed up with facts that are irrelevant to a First Amendment challenge here.[97]

Courts and the Commission—including in the *Tennis Channel* case—have "repeatedly considered, and rejected" arguments by cable operators that carriage remedies compel speech that violates the First Amendment.[98] Cablevision's so-called "new" arguments start with the premise that Cablevision can only be compelled to "speak"—i.e., to carry a network—where there is a substantial governmental interest in regulating that speech. Cablevision asserts that its

business relations because Cablevision's holding company is entity surviving the merger); *see also In the Matter of Alltel Commc'ns, Inc.*, 20 FCC Rcd. 8112, 8114 (2005) (setting forth "substantial continuity" of business operations as test for successor liability).

[96] *See In the Matter of TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atl. Sports Network*, 23 FCC Rcd. 15783 (2008), *overruled on other grounds*.

[97] Cablevision Stay Pet., at 16-19.

[98] *See, e.g., Tennis Channel, Inc.*, 27 FCC Rcd. at 9284 (explaining rejection of "similar arguments advanced by cable operators.").

lack of national market power and its merger with Altice have rendered the government's interest in regulating its carriage of GSN a nullity.

Yet, as discussed above, Cablevision's market power and ownership arguments are *no different* from those that the Courts and the Commission have rejected. Its market power argument is merely a re-articulation of the argument it made with respect to harm. The argument relies solely upon the concurrence by Judge Kavanaugh in the *Tennis Channel* case discussed in Section III.C, *supra*, which has made no change in the law, and it ignores that GSN made showings both regarding the impact on and of Cablevision's national and *local* market power. Likewise, the fact that Cablevision has a new owner in no way eliminates the governmental interest in providing GSN with a remedy for Cablevision's discrimination, especially given that Altice accepted Cablevision's liabilities when it merged with GSN during the pendency of this well-publicized action.

And staying the ALJ's Order on the basis of Cablevision's First Amendment arguments would effectively require the Commission to conclude that the entire jurisprudential line that has marked its First Amendment analysis in 616 cases is likely to be overturned and that the Commission should essentially undertake that task now. Cablevision's addition of a new veneer to its worn-out argument does not give the Commission reason to take such steps.

F. The Action was Timely Filed.

Cablevision will not succeed on its statute of limitations argument, which is contrary to binding precedent and has been consistently rejected by the Media Bureau and the Commission. GSN incorporates by reference its arguments with respect to the limitations issue briefed at

length in its opposition to Cablevision's Application for Review of the Hearing Designation Order.[99]

IV. THE PUBLIC INTEREST WOULD BE DISSERVED BY ALLOWING CABLEVISION TO CONTINUE TO ENGAGE IN ANTICOMPETITIVE DISCRIMINATION.

Finally, Cablevision fails to meet its burden regarding the public interest. The public interest favors prompt compliance with a Section 616 order, especially where—as here—the order mandating compliance comes after five years of litigation. Congress enacted Section 616 expressly to promote competition and diversity in programming by preventing MVPDs from favoring their own networks over unaffiliated networks.[100] The regulatory scheme makes the only remedy available to a complainant is a carriage order to remedy past discrimination; money damages are unavailable. The public interest favoring prompt resolution of carriage complaints also requires the Commission to ensure that MVPDs that violate Section 616 are not able to evade the only meaningful relief offered to independent programmers they have harmed. The is why the Commission promulgated rules specific to Section 616 complaints that make ALJ decisions in carriage cases immediately effective.[101]

Cablevision's suggestion that the public will bear the cost of its compliance with the ALJ's decision is true only if it chooses to raise its subscriber rates in the face of the order, rather than reduce its expenditures in another manner. but even assuming that Cablevision would

[99] *See generally* GSN Opp. to Cablevision Application for Rev. (January 9, 2017).
[100] *See* Pub. L. No. 102-385, 106 Stat. 1460, § 2 (1992).
[101] 47 C.F.R. §§ 76.10(c)(2), 76.1302. This issue is briefed at length in GSN's Reply to its Petition to Compel Compliance, filed simultaneously to this brief.

choose to impose rate increases on its customers, "such speculation does not justify issuance of the extraordinary remedy of a stay."[102]

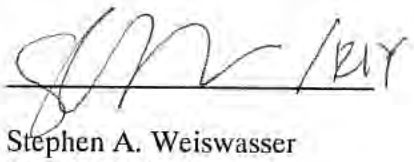
Nor, unlike the *Tennis Channel* case, does this case present novel remedies issues that might suggest the need for a stay. Contrary to Cablevision's suggestion, the Commission found the stay in *Tennis Channel* was warranted not because (as Cablevision suggests) it was the first case to "*result*" in compelled carriage. But rather because *Tennis* was the first instance in which an ALJ had *ordered* a carriage remedy under Section 616 and the Commission decided to preserve the status quo for administrative agency purposes.[103] And now that the Commission and the Courts have exhaustively considered a past Section 616 remedial order—in *Tennis Channel* itself—there is no public interest in the maintenance of the status quo in the GSN case simply to test a first-time application of the law. Cablevision offers no reason why the legal issues surrounding the remedy ordered in the GSN case should require such special attention.

[102] *Tennis Channel*, 27 FCC Rcd., at 9290.
[103] *See id.*, at 5615 ("This is the *first program carriage adjudication in which an initial decision requires* the defendant to carry the complainant's programming").

CONCLUSION

For the reasons set forth above, the Commission should deny Cablevision's petition for a stay and order the immediate enforcement of the Initial Decision pending commission review.

Respectfully submitted,



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